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TORTURING THE TICKING BOMB TERRORIST: AN ANALYSIS OF JUDICIALLY SANCTIONED TORTURE IN THE CONTEXT OF TERRORISM

CHANTERELLE SUNG*

WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE. By Alan Dershowitz. New Haven and London: Yale University Press 2002. Pp. 260.

Abstract: Alan Dershowitz's book examines recent acts of global terrorism and analyzes the reasons why terrorism is successful. In an effort to reduce the frequency and severity of terrorist attacks, Dershowitz discusses different proposals that would deter terrorism while striking a balance between security and liberty. One of Dershowitz's most controversial proposals calls for the use of judicially sanctioned torture to force a terrorist suspect to reveal information that would prevent an imminent terrorist attack. This Book Review explores the justifications for judicially sanctioned torture and ultimately argues that such a proposal would be morally and legally prohibited.

INTRODUCTION

In the wake of September 11, 2001, FBI agents suggested that they might resort to torture to compel terrorist suspects to reveal information necessary to prevent a recurrence.¹ A senior FBI aide stated, "it could get to that spot where we could go to pressure . . . where we won't have a choice, and we are probably getting there."²

While many countries have condemned torture, the reemergence of this issue in public debate reflects the extent to which terrorism currently threatens national security.³ In his timely book, *Why Terror-*

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¹ Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma for FBI*, WASH. POST, Oct. 21, 2001, at A6.

² *Id.*

³ ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 134, 150 (2002); William F. Schulz, *The Torturer's Apprentice*, THE NATION, May 13, 2002, at 25 (reviewing ALAN M. DERSHOWITZ, SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE (2002)).

ism Works: Understanding the Threat, Responding to the Challenge, Alan Dershowitz analyzes the reasons why terrorism has succeeded thus far and offers proposals to deter terrorism while striking the appropriate balance between national security and civil liberties.⁴ Dershowitz confronts and raises many difficult moral and legal questions regarding the extent to which our democratic society can effectively deter terrorism while continuing to uphold fundamental values of liberty and privacy.⁵ He argues that it is possible to deter terrorism on both a macro level, by confronting different types of terrorism, and on a micro level, through controlling it on a smaller scale.⁶

Dershowitz begins with the premise that some terrorists are rational actors who crave attention to their cause.⁷ Policies that address the root causes of terrorists' behavior, therefore, do not deter them but merely reward them with the attention that they crave.⁸ Thus, in order to deter terrorism and preserve national security, society must punish terrorists through collective accountability and incapacitation.⁹ To this end, Dershowitz offers various proposals to increase our sense of security without eroding the liberty that is central to a democratic society.¹⁰

This Book Review focuses on one of Dershowitz's most controversial proposals: the use of judicially sanctioned non-lethal torture to force a terrorist suspect to disclose information that would prevent an imminent and massive terrorist attack.¹¹ Under this proposal, law enforcement officials would be allowed to torture a terrorist suspect after first obtaining a judicial warrant from a court.¹² Dershowitz's proposal responds to a long-standing moral dilemma commonly referred to as the "ticking bomb" scenario.¹³ The "ticking bomb" scenario re-

⁴ DERSHOWITZ, *supra* note 3, at 166–213.

⁵ *Id.* at 3, 201.

⁶ *Id.* at 166. On a macro level, Dershowitz wants to eliminate incentives and impose deterrents to terrorism by incapacitating terrorists, and by ensuring that the international community does not reward terrorists with concessions and decreased support for target countries. *Id.* at 168, 170, 181. On a micro level, Dershowitz wants to strike a balance between security and liberty by, for example, tightening control over national borders, expanding electronic monitoring authority, and requiring national ID cards. *Id.* at 187.

⁷ DERSHOWITZ, *supra* note 3, at 20–23.

⁸ *Id.* at 24–25.

⁹ *Id.* at 172–73, 181.

¹⁰ *Id.* at 196.

¹¹ *Id.* at 151–58. As a form of non-lethal torture, Dershowitz considers shoving sterilized needles under the suspect's fingernails. DERSHOWITZ, *supra* note 3, at 148.

¹² *Id.* at 158.

¹³ *Id.* at 140. See also Emanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights*, 6 UCLA J.

fers to a hypothetical situation where a bomb has been activated and the only person who may have information to prevent or minimize the potential damage from an explosion of the bomb is the suspect, who refuses to disclose this information.¹⁴ The question is whether this suspect should be tortured in order to force him or her to reveal information that could potentially save many lives.¹⁵ While Dershowitz is opposed to torture in general, he argues that people may resort to it in a ticking bomb situation.¹⁶ Judicially sanctioned torture, therefore, represents Dershowitz's solution for minimizing the use of torture against terrorist suspects.¹⁷

By expanding upon Dershowitz's analysis of the ticking bomb scenario, this Book Review takes a closer look at the justifications for judicially sanctioned torture and then argues against this proposal by developing the moral and legal theories that would prohibit its acceptance.¹⁸ Part I presents arguments in favor of torturing the ticking bomb terrorist, and considers how these arguments might support Dershowitz's justification of judicially sanctioned torture.¹⁹ Part II then draws upon the underlying values of international human rights law and Fourth, Fifth, and Fourteenth Amendment constitutional law to argue against torturing the ticking bomb terrorist on the basis of human dignity.²⁰ This part develops the moral and legal prohibitions against torturing the ticking bomb terrorist in order to establish the argument against judicially sanctioned torture.²¹ Part III uses these arguments to demonstrate the inherent problems with judicially sanctioned torture.²² Not only would this proposal undermine judicial integrity, but it would legitimize a practice that runs counter to moral and legal precedent.²³ Finally, Part IV seeks to reconcile the apparent

INT'L L. & FOREIGN AFF. 89, 102 (2001); Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFF. 160, 166-67 (1973).

¹⁴ DERSHOWITZ, *supra* note 3, at 140.

¹⁵ *Id.*

¹⁶ *Id.* at 151.

¹⁷ *Id.* at 158.

¹⁸ See discussion *infra* Parts I, II, III. This Book Review addresses the issue of judicially sanctioned torture from a normative standpoint. For sake of argument only, this Book Review assumes that non-lethal torture is effective in revealing information to prevent a terrorist attack.

¹⁹ See discussion *infra* Part I.

²⁰ See discussion *infra* Part II.

²¹ See discussion *infra* Part II.

²² See discussion *infra* Part III.

²³ See discussion *infra* Part III.

conflict between human dignity and national security that arises from Dershowitz's analysis of the ticking bomb scenario.²⁴

Ultimately, this Book Review concludes that judicially sanctioned torture is not an appropriate solution for minimizing torture against terrorist suspects.²⁵ Society should instead focus on preventing a ticking bomb situation in the first place.²⁶ By expanding the narrow framework of Dershowitz's inquiry, it is possible to focus our debate on alternative means of maintaining national security that do not violate human dignity.²⁷

I. THE TICKING BOMB SCENARIO: DERSHOWITZ'S PROPOSAL FOR JUDICIALLY SANCTIONED TORTURE

For more than a century, much of the world has condemned the general notion of torture.²⁸ Nonetheless, the more specific notion that torture can reveal information to prevent a massive terrorist attack calls for greater attention to the moral and legal arguments in favor of this practice.²⁹ Francis Bacon, a seventeenth century English legal scholar, would most likely have justified torturing the ticking bomb terrorist on the basis that torture is a means to obtaining truthful information.³⁰ According to Bacon, truth is the essence of justice.³¹ Thus, under this theory, torture can be justified even if it sacrifices human dignity, so long as it produces truthful information to prevent an imminent terrorist attack.³²

²⁴ See discussion *infra* Part IV.

²⁵ See Philip B. Heymann, *Torture Should Not be Authorized*, BOSTON GLOBE, Feb. 16, 2002, at A15.

²⁶ Schulz, *supra* note 3, at 25.

²⁷ See DERSHOWITZ, *supra* note 3, at 195–99. See, e.g., John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1083–84 (2002); Christopher Woo & Miranda So, *The Case for Magic Lantern: September 11 Highlights the Need for Increased Surveillance*, 15 HARV. J.L. & TECH. 521, 529–33 (2002).

²⁸ DERSHOWITZ, *supra* note 3, at 145.

²⁹ See DANIEL R. COQUILLETTE, *THE ANGLO-AMERICAN LEGAL HERITAGE: INTRODUCTORY MATERIALS* 317 (1999); DERSHOWITZ, *supra* note 3, at 135; ALAN M. DERSHOWITZ, *SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE* 472 (2002).

³⁰ See COQUILLETTE, *supra* note 29, at 317; DANIEL R. COQUILLETTE, FRANCIS BACON 279 (1992).

³¹ COQUILLETTE, *supra* note 29, at 317; COQUILLETTE, *supra* note 30, at 279.

³² See COQUILLETTE, *supra* note 29, at 317; COQUILLETTE, *supra* note 30, at 279.

Torturing the ticking bomb terrorist can also be justified according to philosopher Jeremy Bentham's principle of utility.³³ The utilitarian principle seeks to maximize the community's total good, pleasure, or happiness.³⁴ On the one hand, if the terrorist suspect is not tortured, the suspect is spared from suffering pain, but thousands of innocent people die.³⁵ On the other hand, if the terrorist suspect is tortured, he suffers pain, but thousands of innocent lives are saved.³⁶ Thus, under Bentham's theory, it would be permissible to allow one terrorist suspect to suffer the pain from non-lethal torture in order to save thousands of innocent lives from a massive terrorist attack.³⁷

Proponents of torturing the ticking bomb terrorist justify the practice from a legal standpoint as well.³⁸ Dershowitz argues that the United States Constitution does not prohibit torturing the ticking bomb terrorist.³⁹ That is, if the terrorist suspect is granted immunity from incrimination, the Fifth Amendment prohibition against self-incrimination would not be implicated because the information revealed by the suspect would not be used against the suspect at trial.⁴⁰ Dershowitz further contends that the due process standard of the Fifth and Fourteenth Amendments would not prohibit torturing the ticking bomb terrorist because such a terrorist is not owed the same kind of due process that is owed to an ordinary criminal defendant.⁴¹ Moreover, Dershowitz notes that the Eighth Amendment prohibition against "cruel and unusual punishment" does not apply in this situa-

³³ DERSHOWITZ, *supra* note 3, at 142; THE COLLECTED WORKS OF JEREMY BENTHAM: AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 12 (J.H. Burns & H.L.A. Hart eds., 1996) [hereinafter BENTHAM].

³⁴ BENTHAM, *supra* note 33, at 12.

³⁵ See DERSHOWITZ, *supra* note 3, at 144; BENTHAM, *supra* note 33, at 12.

³⁶ See DERSHOWITZ, *supra* note 3, at 144; BENTHAM, *supra* note 33, at 12.

³⁷ DERSHOWITZ, *supra* note 3, at 144. See BENTHAM, *supra* note 33, at 12.

³⁸ See DERSHOWITZ, *supra* note 3, at 135; DERSHOWITZ, *supra* note 29, at 472.

³⁹ DERSHOWITZ, *supra* note 3, at 135.

⁴⁰ *Id.* See, e.g., *Kastigar v. United States*, 406 U.S. 441, 462 (1972) (holding that the government may compel testimony from an unwilling witness by conferring on the witness immunity from use of compelled testimony and use of evidence derived from testimony against the witness).

⁴¹ DERSHOWITZ, *supra* note 3, at 135; *60 Minutes* (CBS News television broadcast, Jan. 20, 2002). Dershowitz argues that because due process is the process due under the circumstances, and because the ticking bomb situation represents an extraordinary circumstance, the ticking bomb terrorist is not due the same kind of process as compared to a suspect under ordinary circumstances. *60 Minutes*, *supra*. Specifically, Dershowitz contends that the only process "due" a ticking bomb terrorist is the requirement of probable cause and judicial supervision. DERSHOWITZ, *supra* note 3, at 135.

tion because the ticking bomb terrorist has not yet been convicted.⁴² Thus, under Dershowitz's theory, while the Fifth, Eighth, and Fourteenth Amendment protections would bar other uses of torture, they do not bar the use of torture in the particular "ticking bomb" circumstance.⁴³

In addition, proponents rely on the legal defense of necessity in order to justify torturing the ticking bomb terrorist.⁴⁴ According to the defense of necessity, society authorizes a person to disregard the law if that person is in a strained position and must choose between violating the law and preventing a greater harm.⁴⁵ Like utilitarianism, the defense of necessity relies on the concept of preventing a great wrong by performing a lesser wrong.⁴⁶ For example, the Landau Commission, established in Israel in 1987, relies on the legal defense of necessity to justify the torturous interrogation methods used by the General Security Service (GSS) against terrorist suspects.⁴⁷

In light of these moral and legal arguments in favor of torturing the ticking bomb terrorist, Dershowitz's proposal for judicially sanctioned torture may seem reasonable.⁴⁸ After all, the point of judicially sanctioned torture is not even to encourage the torture of terrorist suspects, but rather, to minimize its use.⁴⁹ Dershowitz contends that because torture in the ticking bomb situation is inevitable, society must choose between two evils: 1) allow torture to occur "ad hoc, off-the-books, and under-the-radar-screen," or 2) incorporate it into the legal system through judicial warrants.⁵⁰ Dershowitz asserts that judi-

⁴² DERSHOWITZ, *supra* note 3, at 135. See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (confirming that the Eighth Amendment is designed to protect those convicted of crimes).

⁴³ DERSHOWITZ, *supra* note 3, at 135.

⁴⁴ DERSHOWITZ, *supra* note 29, at 472.

⁴⁵ *Id.*

⁴⁶ Gross, *supra* note 13, at 107. See also BENTHAM, *supra* note 33, at 12.

⁴⁷ See Gross, *supra* note 13, at 106. The Israel law of necessity, as recognized by the Landau Commission, provides: "A person may be exempted from criminal responsibility for any act or omission if he can show that it was done or made in order to avoid consequences which could not otherwise be avoided and which would have inflicted grievous harm or injury on his person, honour or property or on the person or honour of others whom he was bound to protect or on property placed in his charge: Provided that he did no more than was reasonably necessary for that purpose and that the harm caused by him was not disproportionate to the harm avoided." DERSHOWITZ, *supra* note 29, at 473 (quoting Israeli law).

⁴⁸ See DERSHOWITZ, *supra* note 3, at 158-59.

⁴⁹ *Id.*

⁵⁰ *Id.* at 151, 158. See also Alan M. Dershowitz, *Yes, It Should Be 'On the Books,'* BOSTON GLOBE, Feb. 16, 2002, at A15 [hereinafter Dershowitz, *On the Books*]; Alan M. Dershowitz, *Is*

cially sanctioned torture is the lesser of the two evils.⁵¹ Specifically, it would reduce the amount of torture by creating a democratic system of accountability and by leaving a public record of each warrant sought and granted.⁵²

Indeed, Professor John Langbein of Yale Law School implicitly suggests that torture warrants used in sixteenth and seventeenth century England accounted for fewer incidents of torture, as compared to the number of incidents in France, where torture was left to the discretion of local officials.⁵³ In particular, requiring a torture warrant would minimize the amount of physical violence against terrorist suspects because judges would not grant the warrant absent a compelling reason to do so.⁵⁴ According to Dershowitz, a torture warrant would also minimize the incidents of torture by creating one more opportunity for the suspect to testify before subjecting him or her to such treatment.⁵⁵

II. MORAL AND LEGAL PROHIBITIONS AGAINST TORTURING THE TICKING BOMB TERRORIST

While Dershowitz's proposal for judicially sanctioned torture may seem sensible in light of the apparent justifications for torturing the ticking bomb terrorist, it is significantly undermined by the moral and legal arguments against torture.⁵⁶ From the standpoint of human dignity, international law, and United States constitutional law, the reasons for refraining from torture outweigh its justifications.⁵⁷

A. Human Dignity

First, the inviolable nature of human dignity belies any justifications for torturing the ticking bomb terrorist.⁵⁸ In the seventeenth century, Sir Edward Coke debated against Francis Bacon to

There a Torturous Road to Justice?, L.A. TIMES, Nov. 8, 2001, at B19 [hereinafter Dershowitz, *Torturous Road*].

⁵¹ Dershowitz, *On the Books*, *supra* note 50, at A15.

⁵² *Id.*

⁵³ DERSHOWITZ, *supra* note 3, at 158. See generally JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF 136–37, 139 (1977).

⁵⁴ DERSHOWITZ, *supra* note 3, at 158–59.

⁵⁵ *Id.* at 159.

⁵⁶ See *id.* at 135, 149; Heymann, *supra* note 25, at A15; 60 Minutes, *supra* note 41.

⁵⁷ See *id.* at 135, 149; Heymann, *supra* note 25, at A15; 60 Minutes, *supra* note 41.

⁵⁸ See Oscar Schachter, Editorial Comment, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848, 848 (1983); Schulz, *supra* note 3, at 25; Alan Keyes *Is Making Sense* (MSNBC television broadcast, Feb. 4, 2002).

assert that torture for interrogational purposes violated human dignity and, therefore, could not be justified as a means to obtaining truthful information.⁵⁹ Coke believed that even if an individual were guilty, the individual's human dignity could outweigh any state interest in ascertaining the truth.⁶⁰

Relying on a similar notion of human dignity, philosopher Immanuel Kant opposed torture on the basis that it improperly used people as a means to achieve an end.⁶¹ As part of his categorical imperative, Kant asserted that humans should always be treated as an end and never as a means.⁶² Kant would therefore object to torturing the ticking bomb terrorist because this would violate the terrorist's autonomy, the basis of human dignity, for the end purpose of preventing a massive terrorist attack.⁶³ In this light, the utilitarian justification for torturing the ticking bomb terrorist is unconvincing in that it considers the human life of the terrorist as merely a means for saving other lives.⁶⁴

B. *International Law*

Not only does the notion of human dignity underlie the moral arguments against torture, but it also serves as the basis of international legal prohibitions against torture.⁶⁵ The United States is bound by two covenants that expressly prohibit torture: the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment

⁵⁹ COQUILLETTE, *supra* note 29, at 317. *See generally* SIR EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* (William S. Hein Co. 1986) (1641).

⁶⁰ COQUILLETTE, *supra* note 29, at 317.

⁶¹ DERSHOWITZ, *supra* note 3, at 149. According to Immanuel Kant, "man and generally any rational being *exists* as an end in himself, *not merely as a means* to be arbitrarily used by this or that will, but in all his actions, whether they concern himself or other rational beings, must be always regarded at the same time as an end." IMMANUEL KANT, *KANT'S CRITIQUE OF PRACTICAL REASON AND OTHER WORKS ON THE THEORY OF ETHICS* 46 (Thomas Kingsmill Abbott trans., 6th ed. 1909).

⁶² KANT, *supra* note 61, at 47.

⁶³ *See id.* at 54.

⁶⁴ *See id.*

⁶⁵ International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 7, S. EXEC. DOC. NO. 95-2, at 23 (1978), 999 U.N.T.S. 171, 175 [hereinafter ICCPR]. *See generally* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, at 19 (1988), 1465 U.N.T.S. 85, 113 [hereinafter UN Convention Against Torture].

or Punishment (UN Convention Against Torture).⁶⁶ Article 7 of the ICCPR states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁶⁷ Article 10 of the ICCPR states that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”⁶⁸ Likewise, the UN Convention Against Torture prohibits torture on the basis that humans are endowed with “inalienable rights” that “derive from the inherent dignity of the human person”⁶⁹ Article 2 of the UN Convention Against Torture states that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”⁷⁰ These two international treaties therefore prohibit torture because it would infringe upon the inviolable right to human dignity.⁷¹

Even in the context of the ticking bomb scenario, these international treaties would most likely prohibit torturing the terrorist suspect.⁷² Indeed, in 1999 the High Court of Justice in Israel ruled against using torture to interrogate terrorist suspects because it violates international conventions and “infringes on both the suspect’s dignity and his individual privacy.”⁷³ Later that same year, the Supreme Court of Israel determined that neither the government nor the GSS possess the authority to use “liberty infringing physical means” during the interrogation of terrorist suspects “unless these means are inherently accessory to the very essence of an interrogation

⁶⁶ ICCPR, *supra* note 65, S. EXEC. DOC. NO. 95-2, at 23, 999 U.N.T.S. at 175. *See generally* UN Convention Against Torture, *supra* note 65, S. TREATY DOC. NO. 100-20, at 19, 1465 U.N.T.S. at 113.

⁶⁷ ICCPR, *supra* note 65, S. EXEC. DOC. NO. 95-2, at 25, 999 U.N.T.S. at 175.

⁶⁸ ICCPR, *supra* note 65, S. EXEC. DOC. NO. 95-2, at 26, 999 U.N.T.S. at art. 10, at 176.

⁶⁹ UN Convention Against Torture, *supra* note 65, S. TREATY DOC. NO. 10020, at 19, 1465 U.N.T.S. at 113.

⁷⁰ UN Convention Against Torture, *supra* note 65, S. TREATY DOC. NO. 100-20, at 20, 1465 U.N.T.S. at art. 2, at 114.

⁷¹ *See* ICCPR, *supra* note 65, S. EXEC. DOC. NO. 95-2, at 26, 999 U.N.T.S. at art. 10, at 176; UN Convention Against Torture, *supra* note 65, S. TREATY DOC. NO. 100-20, at 19, 1465 U.N.T.S. at 113.

⁷² *See* Melissa L. Clark, *Israel’s High Court of Justice Ruling on the General Security Service Use of “Moderate Physical Pressure”: An End to the Sanctioned Use of Torture?* 11 IND. INT’L & COMP. L. REV. 145, 164 (2000).

⁷³ Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service’s Interrogation Methods, 38 I.L.M. 1471, 1478 (Sept. 9, 1999); *also available at* H.C. 5100/94, *The Public Committee Against Torture in Israel v. Israel* (Sept. 9, 1999), *available at* <http://www.derechos.org/human-rights/mena/doc/torture.html>.

and are both fair and reasonable.”⁷⁴ With this in mind, the use of torture against the ticking bomb terrorist in the United States would most likely be prohibited by the ICCPR and the UN Convention Against Torture.⁷⁵

C. *United States Constitutional Law*

United States constitutional law would further prohibit torturing the ticking bomb terrorist.⁷⁶ The basis of this prohibition has been most prominently established through case law addressing the Due Process Clause of the Fifth and Fourteenth Amendments and the Fourth Amendment prohibition against unreasonable searches and seizures.⁷⁷

1. Due Process

Contrary to Dershowitz's assertions, the due process standard of the Fifth and Fourteenth Amendments implicitly prohibits torturing the ticking bomb terrorist on the basis of human dignity.⁷⁸ Due process not only entails the procedural right to fair notice, but also entails the substantive right to life, liberty, and property.⁷⁹ Thus, even if the ticking bomb terrorist were tortured in accordance with the due process requirement of procedural fairness, the substantive due process requirement implicitly prohibits the torture.⁸⁰ Under the substantive due process standard articulated by the United States Supreme Court, the terrorist suspect is protected from state conduct that “shocks the conscience” and offends our sense of justice.⁸¹

⁷⁴ *Id.* at 1488.

⁷⁵ ICCPR, *supra* note 65, S. EXEC. DOC. No. 95-2, at 25, 999 U.N.T.S. at 175. *See generally* UN Convention Against Torture, *supra* note 65, S. TREATY DOC. No. 100-20, at 19, 1465 U.N.T.S. at 113.

⁷⁶ *See* *Winston v. Lee*, 470 U.S. 753, 766 (1985); *Schmerber v. California*, 384 U.S. 757, 767 (1966); *Rochin v. California*, 342 U.S. 165, 172 (1952); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936).

⁷⁷ *See* *Winston*, 470 U.S. at 766; *Schmerber*, 384 U.S. at 767; *Rochin*, 342 U.S. at 172; *Brown*, 297 U.S. at 286.

⁷⁸ *See* *Rochin*, 342 U.S. at 172; *Brown*, 297 U.S. at 286.

⁷⁹ *See* *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir. 1973) (holding that, “quite apart from any ‘specific’ of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law.”); Tom Farmer, *Debate Arises Over Torture*, BOSTON HERALD, Jan. 22, 2002, at 7.

⁸⁰ *See* *Johnson*, 481 F.2d at 1032.

⁸¹ *See* *Rochin*, 342 U.S. at 172; *Brown*, 297 U.S. at 286-87.

In particular, the Court has found police conduct to "shock the conscience" where the conduct resulted in physical force and the infliction of pain upon the suspect.⁸² For example, in *Brown v. Mississippi*, the police hanged one suspect by a rope to the limb of tree and severely whipped him and the other suspects until they confessed.⁸³ The Court held that the police conduct in forcing the confessions of suspects was offensive to the "sense of justice."⁸⁴ In emphasizing the means by which the police obtained the information from the suspects, the Court stated that "[i]t would be difficult to conceive of *methods* more revolting to the *sense of justice* than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process."⁸⁵ Thus, the Court determined that the whipping and hanging of the suspects violated their rights to due process.⁸⁶

In a later case, the Supreme Court in *Rochin v. California* found less violent conduct to "shock the conscience" in violation of due process.⁸⁷ In *Rochin*, the police, believing that morphine capsules swallowed by the suspect contained narcotics, unsuccessfully attempted to remove these capsules from the suspect's mouth.⁸⁸ The police then took Rochin to a hospital and ordered doctors to pump his stomach in order to retrieve the capsules.⁸⁹ As in *Brown*, the Court emphasized the outrageous means by which the police extracted evidence from the suspect.⁹⁰ The Court stated, "we are compelled to conclude that the *proceedings* by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is *conduct* that shocks the conscience."⁹¹ The Court further stated, "It has long since ceased to be

⁸² See *Rochin*, 342 U.S. at 172; *Brown*, 297 U.S. at 286–87 see also *United States v. Fernandez-Caro*, 677 F. Supp. 893, 895 (S.D. Tex. 1987) (use of physical torture by foreign officers to coerce information from defendant was sufficiently "shocking to the conscience" so as to require suppression of evidence).

⁸³ *Brown*, 297 U.S. at 281–82.

⁸⁴ *Id.* at 286–87.

⁸⁵ *Id.* (emphasis added).

⁸⁶ *Id.* at 286.

⁸⁷ *Rochin*, 342 U.S. at 172.

⁸⁸ *Id.* at 166.

⁸⁹ *Id.*

⁹⁰ Compare *Rochin*, 342 U.S. at 172, with *Brown*, 297 U.S. at 286.

⁹¹ *Rochin*, 342 U.S. at 172 (emphasis added).

true that due process of law is heedless of the *means* by which otherwise relevant and credible evidence is obtained."⁹²

Indeed, *Rochin* can be distinguished from other cases where the Supreme Court did not find police conduct "shocking to the conscience."⁹³ For instance, *Rochin* is unlike *Breithaupt v. Abram*, where the Court determined that taking a blood sample from the suspect to determine his blood alcohol level was a procedure that occurs in "everyday life" and was therefore not "shocking to the conscience."⁹⁴ Unlike the blood test in *Abram*, the stomach pumping in *Rochin* was certainly not a routine procedure and therefore amounted to conduct that was sufficiently "shocking to the conscience" to violate the due process standard.⁹⁵

Applying the standards set forth in *Brown* and *Rochin* to the torture of the ticking bomb terrorist, it is clear that torturous conduct against the terrorist suspect would not survive due process scrutiny.⁹⁶ The torturous *means* by which information is procured would "shock the conscience" in violation of the Fifth and Fourteenth Amendments.⁹⁷ Because torture inflicts excruciating pain on the suspect to the point of submission, such means of obtaining information would offend the "sense of justice" that the due process standard upholds.⁹⁸

Specifically, if the hanging and whipping of the suspect in *Brown* was too offensive to the "sense of justice" to survive the due process standard, then the torture of the ticking bomb terrorist would likewise fail to survive this standard.⁹⁹ Even if law enforcement officials were to rely on less extreme forms of torture against the ticking bomb terrorist, the use of torture would nonetheless violate the "shock the conscience" standard established in *Rochin*.¹⁰⁰ After all, if the use of force to pump the suspect's stomach in *Rochin* was considered "shocking to the conscience," then it is even more "shocking to the conscience" to intentionally inflict pain on the terrorist suspect until he or she can no longer tolerate the pain and agrees to reveal pertinent

⁹² *Id.* (emphasis added).

⁹³ See *Breithaupt v. Abram*, 352 U.S. 432, 436-37 (1957).

⁹⁴ See *id.* at 436-37; *Rochin*, 342 U.S. at 172.

⁹⁵ See *Abram*, 352 U.S. at 436-37; *Rochin*, 342 U.S. at 172.

⁹⁶ See *Rochin*, 342 U.S. at 172; *Brown v. Mississippi*, 297 U.S. 278, 286 (1936).

⁹⁷ See *Rochin*, 342 U.S. at 172.

⁹⁸ See *Brown*, 297 U.S. at 285-86.

⁹⁹ See *id.*

¹⁰⁰ See *Rochin*, 342 U.S. at 172.

information.¹⁰¹ Furthermore, unlike the routine nature of the blood test in *Abram*, where there was no due process violation, the use of torture against the ticking bomb terrorist is surely not a routine practice.¹⁰² Torturing the ticking bomb terrorist would therefore be prohibited by the due process standard of the Fifth and Fourteenth Amendments.¹⁰³

2. Search and Seizure

Not only would torturing the ticking bomb terrorist violate due process, but it would also violate the Fourth Amendment prohibition against unreasonable searches and seizures.¹⁰⁴ As the Supreme Court stated in *Schmerber v. California*, “[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.”¹⁰⁵ Although the Court in *Schmerber* held that the involuntary extraction of a blood sample from a motorist to determine whether he was intoxicated did not violate the Fourth Amendment, the Court warned that its holding “in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.”¹⁰⁶

Later, in *Winston v. Lee*, where the suspect was compelled to undergo chest surgery to recover a bullet fired by the victim, the Supreme Court balanced a number of factors and ultimately determined that the surgical intrusion was unreasonable and hence in violation of the Fourth Amendment.¹⁰⁷ Among the factors considered were: 1) the threshold requirement of probable cause; 2) the extent to which the procedure may threaten the suspect’s safety or health; 3) the extent of intrusion upon the suspect’s dignitary interests in personal privacy

¹⁰¹ See *id.* See also *United States v. Fernandez-Caro*, 677 F. Supp. 893, 894–95 (S.D. Tex. 1987) (stating that “[e]ven more than in *Rochin*, the methods employed here [beating defendant’s face and body, pouring water through his nostrils while he was stripped, bound, and gagged, and applying electrical shocks to his wet body] were ‘too close to the rack and the screw’ to be acceptable.”).

¹⁰² See *Breithaupt v. Abram*, 352 U.S. 432, 436–37 (1957).

¹⁰³ See *Rochin*, 342 U.S. at 172; *Brown*, 297 U.S. at 286.

¹⁰⁴ See *Winston v. Lee*, 470 U.S. 753, 766 (1985); *Schmerber v. California*, 384 U.S. 757, 767 (1966). The Fourth Amendment provides, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

¹⁰⁵ *Schmerber*, 384 U.S. at 767.

¹⁰⁶ *Id.* at 772.

¹⁰⁷ *Winston*, 470 U.S. at 766.

and bodily integrity; 4) the community's interest in fairly and accurately determining guilt or innocence; and 5) the feasibility of alternative means of producing the pertinent evidence.¹⁰⁸

Applying this "reasonableness" test to the ticking bomb scenario, torturing the ticking bomb terrorist would qualify as an unreasonable seizure of the suspect in violation of the Fourth Amendment.¹⁰⁹ Unlike the blood test in *Schmerber*, where the degree of intrusion on the suspect was minimal, the use of torture against the ticking bomb terrorist is much more intrusive.¹¹⁰ In addition, if the surgical procedure in *Winston*, conducted in a sterilized hospital by a professional doctor, was considered to be a risk to the suspect's health, then the torture of the terrorist suspect by law enforcement officials would be equally if not more risky to the suspect's health.¹¹¹ Moreover, the Court in *Winston* considered the surgical procedure to be an extensive intrusion on the suspect's personal privacy and bodily integrity because it required the suspect to relinquish control of his body.¹¹² Similarly, torturing a terrorist suspect requires the suspect to relinquish bodily control and to suffer excruciating pain, thereby resulting in an extensive intrusion on personal privacy and bodily integrity.¹¹³ Thus, in light of *Schmerber* and *Winston*, the use of torture against the terrorist suspect would violate the Fourth Amendment prohibition against unreasonable searches and seizures.¹¹⁴

¹⁰⁸ *Id.* at 760-63.

¹⁰⁹ *See id.* at 766.

¹¹⁰ *See Schmerber*, 384 U.S. at 771.

¹¹¹ *See Winston*, 470 U.S. at 763-64.

¹¹² *Id.* at 765.

¹¹³ *See id.*

¹¹⁴ *See id.* at 766; *Schmerber* 384 U.S. at 767. Considering two other factors of the "reasonableness test," namely, the community's interest in determining the guilt or innocence of the suspect, and the feasibility of alternative means of producing the pertinent evidence, it is clear that the former factor is not relevant here, where the purpose of torturing the ticking bomb terrorist is not to determine guilt or innocence, but to extract information about an imminent terrorist attack. *See DERSHOWITZ, supra* note 3, at 135; *Winston*, 470 U.S. at 763. The latter factor, however, is relevant to determining the reasonableness of torturing the ticking bomb terrorist. Arguably, if there are no means of producing evidence of an imminent terrorist attack other than by torturing the terrorist suspect, then it would seem reasonable to torture the suspect in order to save hundreds of innocent lives. *See Winston*, 470 U.S. at 763. Nonetheless, Part IV of this Book Review suggests that there are alternative means to producing evidence of an imminent terrorist attack such that it is possible to prevent the ticking bomb situation from arising in the first place. *See discussion infra* Part IV.

III. JUDICIAL INTEGRITY AND THE RULE OF LAW

Given the significant moral and legal arguments against torturing the ticking bomb terrorist, judicially sanctioned torture is wrong from a normative standpoint.¹¹⁵ From the outset, judicially sanctioned torture undermines the integrity of the criminal justice system.¹¹⁶ The problem with judicially sanctioned torture is not only that the torture itself violates the human dignity of the individual suspects, but that the act of judicially sanctioning the torture taints the "purity of [the] courts."¹¹⁷ Because torture violates human dignity, having judges issue torture warrants entangles the judiciary in an abuse of human dignity.¹¹⁸

The concept of judicial integrity may be viewed as the role of the judiciary in leading by example and in invalidating or rectifying certain kinds of offensive official action.¹¹⁹ The underlying goals of judicial integrity are that the court is to be regarded as a symbol of lawfulness and justice and that the court does not ally itself with bad acts.¹²⁰ As Justice Brandeis stated in his dissent in *Olmstead v. United States*,

[d]ecency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. . . . Our government is the potent, the omnipresent teacher. . . . If the government becomes a lawbreaker, it breeds contempt for law¹²¹

¹¹⁵ See Robert M. Bloom, *Judicial Integrity: A Call for Its Re-Emergence in the Adjudication of Criminal Cases*, 84 J. CRIM. L. & CRIMINOLOGY 462, 466 (1993); *Alan Keyes Is Making Sense*, *supra* note 58. While this Book Review analyzes judicially sanctioned torture from a normative standpoint, there are noteworthy empirical arguments against this practice. See Schulz, *supra* note 3, at 25; *Alan Keyes Is Making Sense*, *supra* note 58. For instance, judicially sanctioned torture improperly assumes that law enforcement officials will be able to take their suspects into custody, ascertain that the suspects are terrorists who possess the necessary information to prevent a massive terrorist attack, apply to an appropriate judge for a torture warrant, argue their case for such a warrant, inflict torture sufficient to illicit the necessary information, and evaluate the validity of that information. See Schulz, *supra* note 3, at 25; *Alan Keyes Is Making Sense*, *supra* note 58. Moreover, it would be difficult to accomplish all these steps under a strict time constraint so as to pre-empt an imminent terrorist attack. See Schulz, *supra* note 3, at 25; *Alan Keyes Is Making Sense*, *supra* note 58.

¹¹⁶ See Bloom, *supra* note 115, at 466.

¹¹⁷ *Casey v. United States*, 276 U.S. 413, 425 (1928) (Brandeis, J., dissenting). See Bloom, *supra* note 115, at 466.

¹¹⁸ *Alan Keyes Is Making Sense*, *supra* note 58.

¹¹⁹ Bloom, *supra* note 115, at 464.

¹²⁰ *Id.*

¹²¹ *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

In other words, on the basis of judicial integrity, judges are the primary insurers of lawful acts by the government.¹²² As such, judges should not sanction or participate in illegal or unfair acts.¹²³ If a judge issues a warrant to torture a ticking bomb terrorist, the judge is participating in an act that violates the principle of human dignity that underlies international law and United States constitutional law.¹²⁴ Thus, in an effort to maintain the sanctity of the courts, judges should not be in a position to authorize illegal acts of torture.¹²⁵

Even Francis Bacon, who would have supported torturing the ticking bomb terrorist, would likely have opposed *judicially sanctioned* torture in order to uphold judicial integrity.¹²⁶ Bacon stated:

[A]bove all things, integrity is . . . [a judge's] portion and proper virtue The principal duty of the judge is, to suppress force and fraud In causes of life and death judges ought . . . to remember mercy, and to cast . . . a merciful eye upon the person.¹²⁷

Thus, even if torturing the ticking bomb terrorist were justifiable, the need to maintain judicial integrity would weigh heavily against justifying judicially sanctioned torture.¹²⁸

Moreover, by issuing warrants to torture terrorist suspects, judges risk legitimizing a practice that counters United States and international legal precedent.¹²⁹ Judicially sanctioned torture would send the erroneous message to society that torture is lawful and that there is nothing improper with this practice.¹³⁰ To the extent that the United States is the exemplar of democracy and human rights, it would be wrong for this nation to abandon the rule of law.¹³¹ Dershowitz himself recognizes the high stakes involved if the United States were to declare its intention to allow non-lethal torture of the ticking bomb terrorist.¹³² Such a declaration would become a precedent for other

¹²² See *id.*; Bloom, *supra* note 115, at 464.

¹²³ Bloom, *supra* note 115, at 464.

¹²⁴ See *60 Minutes*, *supra* note 41.

¹²⁵ See *id.*; Bloom, *supra* note 115, at 464.

¹²⁶ See COQUILLETTE, *supra* note 29, at 336.

¹²⁷ *Id.*

¹²⁸ See *id.*

¹²⁹ See *60 Minutes*, *supra* note 41.

¹³⁰ See Heymann, *supra* note 25, at A15; Alan Keyes *Is Making Sense*, *supra* note 58; *Today* (NBC News television broadcast, Sept. 25, 2002).

¹³¹ See *Today* (NBC News television broadcast, Jan. 29, 2002); *60 Minutes*, *supra* note 41.

¹³² See DERSHOWITZ, *supra* note 3, at 142.

nations because this country's actions help define international law.¹³³ If the United States approved of torture in one set of circumstances, this would encourage its widespread and routine use in other countries.¹³⁴ This would also make it more difficult for the United States to condemn this practice if it were used against American citizens abroad.¹³⁵ Consequently, judicially sanctioned torture would increase rather than decrease the prevalence of torture.¹³⁶

IV. RECONCILING NATIONAL SECURITY AND HUMAN DIGNITY

This Book Review argues that judicially sanctioned torture is not an appropriate solution for minimizing the use of torture against ticking bomb terrorists.¹³⁷ Yet, by not judicially sanctioning torture, will the use of torture against ticking bomb terrorists continue unfettered?¹³⁸ Expanding the narrow framework of Dershowitz's moral inquiry reveals that the answer to this question is no.¹³⁹

Under Dershowitz's narrow framework, society must choose between national security on the one hand, and either "off-the-books" torture or judicially sanctioned torture on the other hand.¹⁴⁰ In other words, Dershowitz forces us to choose between national security and human dignity.¹⁴¹ He states, "If we do not torture, we compromise the security and safety of our citizens."¹⁴² Seen in this narrow framework, it is not surprising that Dershowitz chooses to judicially sanction torture as the lesser of two evils in the name of national security.¹⁴³

By expanding the framework of Dershowitz's inquiry, however, the cost of upholding human dignity need not be the sacrifice of national security.¹⁴⁴ It is possible to refrain from judicially sanctioned torture by developing alternative, less invasive means of upholding

¹³³ See *id.*

¹³⁴ *Id.* at 145; Heymann, *supra* note 25, at A15.

¹³⁵ See Alan Keyes *Is Making Sense*, *supra* note 58.

¹³⁶ See *id.*

¹³⁷ See discussion *supra* Part III.

¹³⁸ See DERSHOWITZ, *supra* note 3, at 158.

¹³⁹ See *id.* at 195–99. See, e.g., Whitehead & Aden, *supra* note 27, at 1083–84; Woo & So, *supra* note 27, at 529–33.

¹⁴⁰ See DERSHOWITZ, *supra* note 3, at 158.

¹⁴¹ *Id.* at 153.

¹⁴² *Id.*

¹⁴³ See *id.* at 158; Dershowitz, *On the Books*, *supra* note 50, at A15.

¹⁴⁴ See DERSHOWITZ, *supra* note 3, at 195–99. See, e.g., Whitehead & Aden, *supra* note 27, at 1083–84; Woo & So, *supra* note 27, at 529–33.

national security.¹⁴⁵ Dershowitz himself offers alternative ways to increase security: issuing national identification cards, restricting immigration, increasing the number of security checkpoints, increasing the presence of electronic surveillance, and improving our intelligence system.¹⁴⁶ By developing these alternative measures of increasing national security, law enforcement officials and citizens may be able to gather evidence of imminent terrorist plots before having to resort to torturing the ticking bomb terrorist for such information.¹⁴⁷

One benefit of using alternative measures for increasing national security is that law enforcement officials will be less likely to rely on coerced information from terrorist suspects as the sole source of evidence of imminent terrorist attacks.¹⁴⁸ As John Henry Wigmore forewarns, coerced confessions are problematic to the extent that they discourage a complete investigation of the evidence.¹⁴⁹ Wigmore states, "any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of other sources."¹⁵⁰ To this extent, judicially sanctioned torture would discourage efforts to seek alternative sources of reliable evidence of imminent terrorist attacks.¹⁵¹ It is through these alternative sources that society should try to prevent a ticking bomb situation from arising in the first place.¹⁵² In this way, and not by judicially sanctioning torture, we can minimize the need to torture terrorist suspects.¹⁵³

To be sure, many of these alternative measures are themselves quite invasive, if not of human dignity, then of other individual rights such as liberty and privacy.¹⁵⁴ Thus, it is important to expand the

¹⁴⁵ See, e.g., Whitehead & Aden, *supra* note 27, at 1083–84; Woo & So, *supra* note 27, at 529–33.

¹⁴⁶ DERSHOWITZ, *supra* note 3, at 195–199.

¹⁴⁷ See *id.*

¹⁴⁸ See JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2251 (2d ed. 1923).

¹⁴⁹ See *id.*

¹⁵⁰ *Id.*

¹⁵¹ See *id.*

¹⁵² See Schulz, *supra* note 3, at 25; See e.g., Whitehead & Aden, *supra* note 27, at 1083–84; Woo & So, *supra* note 27, at 529–33.

¹⁵³ See Schulz, *supra* note 3, at 25; See e.g., Whitehead & Aden, *supra* note 27, at 1083–84; Woo & So, *supra* note 27, at 529–33.

¹⁵⁴ See James X. Dempsey, *Civil Liberties in a Time of Crisis*, 29 HUM. RTS. 8, 8 (2002); Whitehead & Aden, *supra* note 27, at 1083–84; Woo & So, *supra* note 27, at 529–33.

framework of Dershowitz's analysis so that our nation can begin to determine the extent to which citizens may, if at all, forgo certain civil liberties in the name of national security.¹⁵⁵ Ideally, there should be no costs, in terms of civil liberties, to uphold national security.¹⁵⁶ Yet, if our nation *must* pay a price, it is better to invest our current energies in identifying and strengthening proposals that minimize the risk of infringing liberty, than in devising a complex judicially sanctioned torture system that undermines human dignity.¹⁵⁷ If the hard choice is between two evils in the name of national security, it would be better to risk minimal amounts of our liberty rather than to sacrifice all of our human dignity.¹⁵⁸

CONCLUSION

In his book, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, Alan Dershowitz argues in favor of judicially sanctioned torture of the ticking bomb terrorist.¹⁵⁹ He argues that this proposal will minimize and prevent the use of torture against ticking bomb terrorists by creating a democratic system of accountability.¹⁶⁰ Although Dershowitz offers compelling arguments in favor of judicially sanctioned torture, his proposal is both morally and legally reprehensible.¹⁶¹

From a moral standpoint, the need to uphold the universal fundamental right of human dignity prohibits torture under any circumstance, even in the case of the ticking bomb terrorist.¹⁶² This concept of human dignity also serves as the basis for international legal prohibitions against torture.¹⁶³ Moreover, United States courts would most likely find that torturing the ticking bomb terrorist violates the consti-

¹⁵⁵ See Dempsey, *supra* note 154, at 8; Whitehead & Aden, *supra* note 27, at 1083-84; Woo & So, *supra* note 27, at 529-33.

¹⁵⁶ See Dempsey, *supra* note 154, at 8.

¹⁵⁷ See *id.* If, in the name of national security, Dempsey is weary of risking civil liberties, then it would be even worse to accept a wholesale loss of human dignity through judicially sanctioned torture. See *id.*; Heymann, *supra* note 25, at A15.

¹⁵⁸ See Dempsey, *supra* note 154, at 8; Heymann, *supra* note 25, at A15.

¹⁵⁹ See DERSHOWITZ, *supra* note 3, at 158.

¹⁶⁰ See *id.*

¹⁶¹ See Heymann, *supra* note 25, at A15; Schulz, *supra* note 3, at 25.

¹⁶² See Schulz, *supra* note 3, at 25; *Today*, *supra* note 130.

¹⁶³ ICCPR, *supra* note 65, at 175. See generally UN Convention Against Torture, *supra* note 65, at 113.

tutional due process standard and the prohibition against unreasonable searches and seizures.¹⁶⁴

Considering that torturing the ticking bomb terrorist would not survive moral and legal scrutiny, it is not possible to justify judicially sanctioned torture of the ticking bomb terrorist.¹⁶⁵ Not only would this proposal undermine judicial integrity, but it would send the erroneous message that torture is legitimate.¹⁶⁶ For these reasons, judicially sanctioned torture is not the proper solution for minimizing the use of torture against ticking bomb terrorists.¹⁶⁷

The threat of terrorism facing our nation today is a large scale problem that would be more appropriately addressed by focusing on methods of increasing national security without infringing on human dignity.¹⁶⁸ While it is tempting to anticipate the ticking bomb scenario and to analyze ways to properly torture the ticking bomb terrorist, our efforts would be more effectively served by upholding the fundamental values and principles underlying our democracy.¹⁶⁹ After all, the war against terrorism is not simply a military battle, but it is also a battle to defend our national values, including human dignity, justice, and the rule of law.¹⁷⁰ To resort to judicially sanctioned torture as a means of preserving national security would be to abandon the most basic principles of democracy and capitulate to the goals of terrorism.¹⁷¹ Surely, this must not be allowed.¹⁷²

¹⁶⁴ See *Winston v. Lee*, 470 U.S. 753, 766 (1985); *Schmerber v. California*, 384 U.S. 757, 767 (1966); *Rochin v. California*, 342 U.S. 165, 172 (1952); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936).

¹⁶⁵ See Bloom, *supra* note 115, at 466; *Alan Keyes Is Making Sense*, *supra* note 58.

¹⁶⁶ See Bloom, *supra* note 115, at 466; Heymann, *supra* note 25, at A15; *60 Minutes*, *supra* note 41.

¹⁶⁷ See Heymann, *supra* note 25, at A15; *Alan Keyes Is Making Sense*, *supra* note 58.

¹⁶⁸ See DERSHOWITZ, *supra* note 3, at 158; Whitehead & Aden, *supra* note 27, at 1083-84.

¹⁶⁹ See *Alan Keyes Is Making Sense*, *supra* note 58; *Today*, *supra* note 131.

¹⁷⁰ See *Today*, *supra* note 131.

¹⁷¹ See *id.*; *60 Minutes*, *supra* note 41.

¹⁷² See *60 Minutes*, *supra* note 41.